United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

No, 22,322

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

645

UNITED STATES OF AMERICA

v.

JOHN L, EDWARDS, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. Where an arresting officer lacks at the time of arrest belief that a felony has been committed, may the trial court nevertheless validate the arrest without warrant, on the ground that information known to the arresting officer would have justified such a belief?

2. Was the information known to the arresting officer sufficient for a prudent and reasonable belief that Appellant had committed a felony?

This case has not previously been before this Court under the same or similar title.

I N D E X

TABLE OF CASES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,322

UNITED STATES OF AMERICA

v.

JOHN L. EDWARDS

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of conviction on two counts of an indictment, charging him with violations of 22 D.C.C. 1801, housebreaking, and 22 D.C.C. 2201, grand larceny. By order of the District Court Appellant was allowed to prosecute his appeal without prepayment of costs.

This Court has jurisdiction of the appeal pursuant to 28 U.S.C. 1291, and Rule 37 of the F.R.C.P.

STATEMENT OF THE CASE

Appellant was indicted on two counts: the first count charging a violation of 22 D.C.C. 1801 on or about November 9, 1967, in that appellant allegedly entered the offices of the Brazilian Naval Commission with intent to steal property of another; the second count charging a violation of 22 D.C.C. 2201 on the same date, in that Appellant allegedly stole property of the Republic of Brazil, consisting of an electric typewriter valued in excess of $100.00.

After trial before a jury Appellant was convicted on both counts, and sentenced to two to six years on each count, the sentences to run concurrently.

Prior to trial, Appellant timely moved to suppress evidence, on the ground that Appellant was arrested without a warrant and without probable cause, in violation of the Fourth Amendment of the United States Constitution, and that the search incident to such arrest was, thus, illegal.

The circumstances preceding the arrest were related by the arresting officer as follows (Motion to Suppress, Tr. 4-22):

Police Officer Resignato testified that he was patrolling in a police scout car, when he received a radio run to investigate "trouble" at the Metro Media Building, 5151 Wisconsin

Avenue, N.W.; that as his squad car arrived at the building, and as he was entering, he observed Appellant standing in front of the building.

Officer Resignato's testimony as to what he was told, and what he then did, follows (Tr. 6-11):

> Q. What occurred then, sir?
>
> A I asked who had called the police, and an employee in the building said that he had. And he stated that the building was closed, all the people had gone except for the clean-up crew, and while he was cleaning up in that particular floor, he observed the Defendant there in one of the offices. He asked him what he was doing there. He said that -- he related to me that the Defendant said that he was looking for a job and had responded there to see a certain party, I forgot the name, and when the employee told him there was no such party there, he left.
>
> He gave me the description of the man, my partner and I, he gave us a description; and I told my partner I was going to head south on Wisconsin Avenue and see if I could locate this party, and ask him what he was doing in the building.
>
> So I went down, got in the scout car, I made a round of about two blocks square, and as I was coming north on Wisconsin Avenue in the 5000 block, I observed the Defendant getting into a taxi cab.

He had a suitcase at this time. He got in the taxi cab and they were headed south on Wisconsin Avenue.

I made a U-turn and fell in behind, called for assistance on the radio, and made a stop in the either 4500 block of Wisconsin Avenue. At that time I got out of the car, asked the driver to get out of the car, and --

Q Did you take that taxi cab driver's name and address?

A No, I did not.

THE COURT: Officer, before you go on, did the employee of the building give you any description of the man that he said had come to the offices?

THE WITNESS: Yes, sir. He described the man that I had seen standing in front of the building.

THE COURT: In what way did he describe him?

THE WITNESS: He described him as being a Negro male, that the fact that he was about six-foot-some-odd tall, and he was wearing a white fedora hat with a black band. And I mentioned right at that time, that is the man that was standing in front of the building when I came in. I said, let me go look for him before he got too far away.

BY MR. FELDMAN:

Q Didn't he tell you at that time that the man he saw in the

building had a suitcase?

A No, he did not.

Q When he told you what had happened, he never related to you that the man he was talking about had had a suitcase?

A No, he never did.

Q Allright. Drawing your attention back to when you stopped the taxi cab --

A I asked the driver of the taxi cab to get out of the car on the pretext that he had violated traffic regulations, and once I got him away from the car, I went around and approached the Defendant and asked him to step out of the car; which he did. I asked him if he had been in the building at 5151 Wisconsin Avenue; he said, he had. I asked him for what reason he was there; he said he was looking for a job. He gave me the name of the party he was looking for, though, I don't remember.

I said, well, the employee in that building said there was no such party. Then the next thing I did, I asked him if he would mind coming back to the building to speak to the employee to see what this was all about; and he agreed readily. We got back in the scout car.

Q Did you frisk him at that time?

A No, sir.

Q Was he free to go?

A I asked him if he would go. If he had refused, I would have let him go.

Q You have let him go?

A Yes, sir.

Q Did you have his hands against the taxi cab?

A No, sir.

Q You did not take the taxi cab driver's name?

A No, sir.

Q Isn't the usual procedure to take any witnesses to such incidents names and addresses?

MR. UNTHANK: I object.

THE COURT: Well, we are on a motion. I will let him ask it here.

BY MR. FELDMAN:

Q Isn't it the usual procedure, Officer, in situations where you are investigating criminal offenses, that you take the names and addresses of all people who may be witnesses or instrumental in the preparation of the case for Court?

A It is when I consider we are preparing for Court. I didn't know what I had here, sir.

Q You certainly didn't think you had a felony, did you?

A No, sir, I didn't know what I had.

Q All right. How exactly did you take the Defendant back to 5151 Wisconsin Avenue?

A I asked him point blank if he would mind coming back to the building to speak to the employee, and he agreed.

Q And so did you take him back?

A Yes, sir, I took him back in my car.

Q How many other officers were on the scene at this time?

THE COURT: What scene?

MR. FELDMAN: At the scene.

THE COURT: When he got back?

MR. FELDMAN: No, Your Honor, I am sorry.

THE COURT: Where there any officers with you at the taxi cab?

THE WITNESS: Yes, sir, I put in a call for assistance on the radio before I made the stop, and a two-man scout car showed up on the scene just about the time I made the stop.

MR. FELDMAN:

Q So there were three officers around that taxi cab at the time this occurred?

A Yes, sir.

Q And the Defendant then went in the police car with you?

A Yes, sir. I don't recall if it was in my car or the two officers' car. I don't remember that particular incident, but we did in fact take him back to the building.

Q Did he have the suitcase with him at that time?

A He had a suitcase with him at the time.

Officer Resignato described the manner of arrest as follows (Tr. 14-15):

> Q Officer, drawing your attention back to the time you stopped the taxi cab, how exactly did you stop it?
>
> A Well, from the 5000 block to the 4500 block is a distance of five blocks, and I was by myself, so I radioed the dispatcher to send some assistance and the stop would be made in the 4500 block. That would give them time to get there.
>
> So when we got into the 4500 block, I put my red light on and proceeded to stop the cab as if

it was a traffic violation; I motioned the driver over to the curb; which he did.

Q Then you did not speak at all to the driver, just went right over to --

A No, I got out of the car, I approached the driver and asked him to step out of the car, telling him that he had violated traffic regulation.

Q That was just a pretext?

A That was a pretext to get him away from the car. I didn't know what I had there.

Q You had no real reason for stopping that car?

MR. UNTHANK: Objection.

THE COURT: That is an argumentative question. Sustained. He described what his reasons were. If you want to ask him about any other reasons, you can.

BY MR. FELDMAN:

Q Neither the taxi cab driver nor this Defendant committed any offense in your presence?

A That is correct.

Q And at the time you waved it over, you say other officers also were there?

A As soon as I approached the car, they pulled up.

Appellant's presence in the building was noticed sometime between 5:30 - 5:45 p.m.; a police officer testifying that he had received a "radio run" in his patrol car at 5:58 p.m. (Tr. 27).

Mr. Miles, supervisor of the cleaning crew, testified that he had arrived at the building between 5:00 - 5:30 p.m. on November 9, 1967. Some of the office occupants were present, most had gone. Where the occupants had left, he turned the lights on and left doors open preparatory for cleaning (Tr. 33-34).

The building, a commercial office building, is open at that time of day, and "people are coming and going" (Tr. 35). Mr. Miles observed Appellant enter an elevator on the first floor, and noticed that the elevator stopped at the fifth floor. He followed to the fifth floor and saw Appellant in an office of the Brazilian Naval Commission where he had previously turned lights on and left the door open (Tr. 37-38).

Appellant said he was looking for a Mr. Bent, and Mr. Miles offered to escort him to offices which the Brazilians occupied below the first floor level. Both men took an elevator there, but Appellant did not step out with Mr. Miles. Instead he returned the elevator to the fifth floor, without Mr. Miles, and Mr. Miles telephoned the police at that point,

between 5:30 - 5:45 p.m. He reported that "I thought I had an intruder in the building, because I didn't know how to phrase it" (Tr. 39-42).

Mr. Miles did not see Appellant leave the building, and the police arrived within 10-15 minutes after he called them (Tr. 42).

A police officer, William A. Budzenski, who arrived at the building in another patrol car, testified that he accompanied Officer Resignato into the building; that it was open to the public; that he, as well as Officer Resignato, saw Appellant standing near the building as he entered; that he immediately recognized Appellant from Mr. Miles' description, but that he and Officer Resignato, before setting out after Appellant, spent 5-10 minutes looking through offices in the building without observing anything amiss (Tr. 23-28).

With respect to the time of arrest, the evidence was conflicting. The trial court found that the arrest took place, "when the taxi cab was stopped", and when "the Defendant was questioned at the taxi cab, patted down, and put into a squad car". (Tr. 74, 76). It found that there was probable cause for this arrest; and that the subsequent search of Appellant's suitcase was therefore justifiable (Tr. 76).

Upon Appellant's being returned to the building, a search of the suitcase revealed an electric typewriter which

had been kept in its fifth floor offices by the Brazilian Naval Commission.

The trial court denied Appellant's motion to suppress the evidence revealed by the search. The reasons given by the trial court are as follows (Tr. 76-77, R. 15):

> No offense was committed in the presence of the arresting officers. For the arrest to be upheld, the officer must have had facts and knowledge, reasonably trustworthy, sufficient in themselves, to warrant a man of reasonable caution to believe a felony had been committed. The officer was apprised that the man arrested fitted the description of a strange man observed in the offices of the Brazilian Naval Commission about 5:45 p.m., carrying a suitcase, after closing hours, whose conduct had been sufficiently suspicious to lead the custodian to call the police,
>
> Housebreaking is a felony. It is committed when there is entry without breaking with specific intent to steal. There was entry, and the surrounding circumstances were sufficient from which a reasonably cautious man could infer the intent. Accordingly, the typewriter found in the Defendant's suitcase will not be suppressed.

UNITED STATES CONSTITUTION

The Fourth Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

S T A T U T E S

22 D.C.C. 1801, housebreaking, provides as follows:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

22 D.C.C. 2201, grand larceny, provides as follows:

> Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

SUMMARY OF ARGUMENT

A. The arresting officer admitted that he did not believe that a felony had been committed at the time he intercepted the taxicab and ordered Appellant to return to the building in a police car. The trial court, having found that an arrest was made at this time, was required to conclude that it was an illegal arrest, because of the arresting officer's admission. Instead, it erroneously and improperly substituted in place of the arresting officer's actual belief its own legal conclusion with respect to probable cause, in order to sustain the arrest.

B. The trial court's conclusion with respect to the existence of probable cause is erroneous. There was no probable cause for believing that Appellant had committed a felony at the time of arrest, and the arresting officer so admitted.

ARGUMENT

POINT ONE

A. The trial court erroneously intruded its views on probable cause, in place of the arresting officer's actual belief at the time of arrest that there was no indication that any crime had been committed, let alone a felony.

B. Assuming the trial court had the right to substitute its legal conclusion in place of the arresting officer's actual belief, it erroneously found probable cause where there was none.

A.

At the time Officer Resignato made the arrest, he had the following facts to go on: He arrived at the office building at approximately 6:00 p.m. in response to a "trouble" message. The building was open, with people "coming and going" (Tr. 35). He is informed by a building supervisor that an unknown male was found a short time before in the Brazilian offices, at a time when the occupants had gone for the day and the supervisor had turned the lights on and left the door open for cleaning personnel. He is further informed that the stranger said that he was there looking for a named individual about a job.

As soon as the supervisor describes the stranger, Officer Resignato recognizes a male he saw standing (nothing unusual about him) in front of the building, when Officer Resignato arrived and entered (Tr. 5-8). Despite this recognition, Officer Resignato and at least one other officer spend 10-15 minutes searching the building. They find nothing amiss. Officer Resignato and the other officers then set out in search of the man they saw standing in front of the building as they entered. Officer Resignato sees the individual entering a taxicab, with a suitcase. Officer Resignato makes it quite clear that this is the first time he has seen the individual with a suitcase, and that the building supervisor never mentioned a suitcase to him (Tr. 5, 7, 8, 16, 17). Officer Resignato follows the taxicab and intercepts it, orders Appellant out and back to the building in a police car. The trial court has determined that this is the moment of arrest.

It is clear from Officer Resignato's testimony that he believed at the time of arrest that he did not have sufficient grounds to arrest without a Warrant. The trial court ignores Officer Resignato's actual belief, and substitutes in its place an extraneous legal conclusion that there existed probable cause for an arrest without a Warrant.

Officer Resignato unequivocally stated that he did not believe a felony had been committed (Tr. 10):

> Q. You certainly didn't think you had a felony, did you?
>
> A. No sir, I didn't know what I had.

He candidly admitted that he intercepted the taxicab "on the pretext that [the driver] had violated traffic regulations" (Tr. 8). He, then, got Appellant out of the cab and questioned him, admittedly without gain. He and the other police officers who had arrived, then, brought Appellant and his suitcase back to the building.

Officer Resignato sought to justify the search of Appellant's suitcase solely on the ground that the arrest took place only after he had taken Appellant back to the building and it was ascertained from a cleaning woman that a typewriter was missing (Tr. 12-13). Admitting that he did not believe, when he intercepted the taxicab, that a felony had been committed, he sought to convince the trial court that Appellant was "free to go", after the cab had been stopped, that Appellant was "not under arrest at the time", and that Appellant "voluntarily" returned to the building (Tr. 9, 12).

Having found that the arrest took place with the interception of the taxicab, the trial court was bound to find further

that the arrest was illegal, because of the arresting officer's concession that he did not believe, at that point in time, that a felony had been committed.

The trial court's substitution of its own views on probable cause is not only erroneous, but quite unwholesome. It is remarkable that the court, having rejected officer Resignato's version of what happened when he intercepted the cab, could blind itself to the necessary corollary of that rejection: that the police officer, not believing that a felony had been committed, had consciously undertaken to violate the law, by arresting Appellant until an investigation could be made to determine whether there had been any violation of law, let alone the commission of a felony.

The trial court not only ignored the arresting officer's trespass, but it then proceeded to compound the wrong by legalizing the arrest on a ground explicitly disavowed in the arresting officer's testimony. In effect, the trial court abandoned its judicial function for an advocate's role.

It is the actual "belief" of the arresting officer which is in issue, and not what a trial court feels the arresting officer could have justifiably believed. Inquiry into the legality of an arrest without a warrant is always concerned with the substance of the arresting officer's <u>belief</u> that a

felony has been committed. Brinegar v. United States, 1949, 338 U.S. 160, 175, 69 S. Ct. 1302; Wrightson v. United States, 1955, 95 U.S. App. D.C. 390, 222 F.2d 556, 558. DeBruhl v. United States, 1952, 91 U.S. App. D.C. 125, 199 F.2d 175, 176, cert. den. 344 U.S. 868; Mills v. United States, 1952, 90 U.S. App. D.C. 365, 196 F.2d 600, 601.

A priori, if an arresting officer does not believe from the information he has, that he has reason to make an arrest without a warrant, there is no need for inquiry into the existence of probable cause for an arrest. It is only where the arresting officer asserts his belief that a felony had been committed, that inquiry into the reasonableness of this belief becomes relevant.

Here the arresting officer openly admitted that he had no belief that a felony had been committed. He openly admitted that lacking belief, he stopped the taxicab "on the pretext that he [the cab driver] had violated traffic regulations." (Tr. 8). Having conceded his lack of belief in his right to make an arrest at the taxicab, the arresting officer sought to have the trial court accept the thesis that Appellant was not arrested at the taxicab, but that he voluntarily returned to the building and voluntarily revealed the typewriter.

It is clear that the arrest at the taxicab took place, not because of a belief that a felony had been committed, but in spite of the lack of any such belief. The arrest was undertaken solely for the purpose of detaining Appellant, so that he could be interrogated and searched, in pursuit of evidence that he had committed some yet undiscovered felony.

"Where the arrest is only a sham or a front being used as an excuse for making a search, the arrest itself and the ensuing search are illegal." Taglavore v. United States, 9 Cir., 1961, 291 F.2d 262, 265, citing and quoting Worthington v. United States, 6 Cir., 1948, 166 F.2d 557; Henderson v. United States, 4 Cir., 1926, 12 F.2d 528, 51 A.L.R. 420; United States v. Lefkowitz, 1932, 285 U.S. 452, 467, 52 S. Ct. 420, 424.

The search here having been made without warrant, and not being incidental to a legal arrest, it was in violation of the Fourth Amendment. Stephens v. United States, 1959, 106 U.S. App. D.C. 249, 271 F.2d 832, 833; Wrightson v. United States, 1955, 95 U.S. App. D.C. 390, 222 F.2d 556, 558-559. The results of the search are for that reason to be suppressed. Williams v. United States, 1956, 99 U.S. App. D.C. 161, 237 F.2d 789; Wrightson v. United States, supra.

B.

An assumption that the trial court had the right to evaluate probable cause independently of the arresting officer's belief, is indefensible. The trial court's function is to judge whether the arresting officer's belief that a crime had been committed was reasonable in the circumstances. It certainly oversteps its function when it brushes aside the arresting officer's rationalization, and substitutes its own.

The test laid down by the Supreme Court deals with the arresting officer's belief, and its many applications stress that the reasonableness of his belief must be measured within the specific time-action frame in which he found himself.

In Beck v. Ohio, 1964, 379 U.S. 89, 91, the Supreme Court has pointed out that whether an arrest without a warrant is constitutionally valid depends upon whether, "at the moment the arrest was made, the officers had probable cause to make it--whether at that moment the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. Brinegar v. United States, 338 U.S. 160, 175-176; Henry v. United States, 361 U.S. 98, 102."

The trial court has found in this case that the arrest took place at the taxicab, and Officer Resignato admitted that, at that point in time, he had no belief that a crime had been committed. The trial court, nevertheless, validates the arrest. It is the trial court's function to find imprudence where it exists, but it certainly acts without authority when it seeks to find that an arresting officer has been <u>too</u> prudent.

Whether probable cause existed was, in the first instance, a decision for Officer Resignato to make. Having decided that the circumstances did not warrant him to believe that Appellant had committed a felony, he left nothing for the Court to decide with respect to probable cause.

The trial court's substitution of its own rationale for that of the arresting officer's, is a mischievous departure from judicial criteria. It will encourage police officers to forego the initial <u>prudent</u> decision which the law now requires of them. The benefit of doubts which might stay a warrantless arrest will inevitably be resolved by them against the citizen. Why, indeed, should a police officer not proceed on the premise that his prudent scruples are immaterial, if probable cause is to be determined by a judge without regard to the police officer's evaluation?

It is a sterile exercise to consider probable cause divorced from the arresting officer's belief that it was lacking. Nevertheless, Officer Resignato's decision that he lacked grounds to believe Appellant guilty of a felony was a reasonable and prudent conclusion. He had responded to a "trouble" call; as he arrived about 5:45 p.m., he saw Appellant standing normally in front of the building; as he entered the building he could see that it was still open for those who had business there; he was told that the building employe was suspicious of a man found in the offices of the Brazilians, which were open and lighted, although the personnel had departed for the day, and that the man had said that he was there to meet a named individual, which might or might not have been true. So far, the police officer certainly did not have grounds for believing reasonably that Appellant had committed a felony. Recognizing this, the police officer, although he immediately recognized that the building employe had described the man the police officer had seen standing in front of the building as he drove up, undertook a search of the offices to see whether there was evidence of a crime. He found none. At this point, Officer Resignato had even less to go on than when he first heard the building employe's suspicions.

He then sought out and intercepted Appellant upon the pretext that traffic regulations had been violated. Again he neither heard nor saw anything which indicated that Appellant had committed any offense. He, nevertheless, detained Appellant at this point, effecting an arrest in the judgment of the trial court. Officer Resignato believed that he lacked grounds for arrest at this point, and he sought to convince the trial court that he had not made an arrest then, and that Appellant voluntarily accompanied him back to the building where the arrest took place only after further inquiry revealed that a typewriter was missing.

The arresting officer's belief that he lacked grounds for an arrest was reasonable and prudent. He was on the scene, making one of countless "trouble" runs usually made by him, many of which undoubtedly revealed no sign of a criminal offense. He was told of a "suspicious" circumstance, but after a search nothing seemed to be amiss. He had seen the "suspect" standing normally in front of the building. He later saw the Appellant normally entering a taxicab. Going on what he had, he did not believe as a prudent police officer that a felony had been committed.

The trial court was unjustified in substituting its own conclusion. In saying that there were grounds for a belief

that a felony had been committed, the trial court substituted hindsight for the arresting officer's belief at the time of arrest.

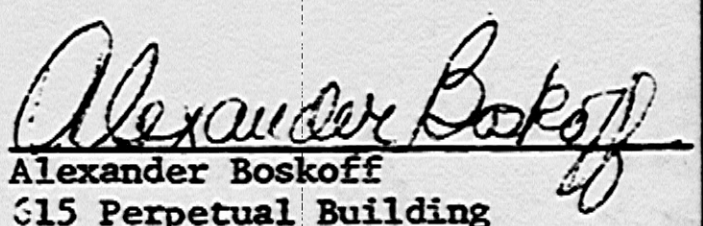
In this respect, it is pertinent to recall the admonition of the Supreme Court in United States v. DiRe, 1948, 332 U.S. 581, 595, 68 S. Ct. 222, 228:

> The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officers' knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success.

C O N C L U S I O N

The trial court erred in not suppressing the results of the search, which was incidental to an illegal arrest. Since the fruits of the search were the only evidence linking Appellant to the crimes charged, the judgment of conviction must be reversed and the trial court directed to enter a judgment of acquittal.

Respectfully submitted,



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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,322

UNITED STATES OF AMERICA, APPELLEE

v.

JOHN L. EDWARDS, APPELLANT

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
DANIEL E. TOOMEY,
Assistant United States Attorneys.

Cr. 123-68

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TABLE OF CASES

* Cases chiefly relied upon marked with asterisks.

ISSUES PRESENTED

I. Was the trial court correct in determining that the arresting officer had probable cause to arrest when the officer expressel reservations to the contrary?

II. Was the information possessed by the arresting officer sufficient to support the trial court's finding that a reasonable prudent and cautious police officer would have probable cause to believe a felony had been committed by the appellant?

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,322

UNITED STATES OF AMERICA, APPELLEE

v.

JOHN L. EDWARDS, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed February 12, 1968, appellant was charged with housebreaking (22 D.C. Code § 1801), and grand larceny (22 D.C. Code § 2201), in that on or about November 9, 1967, he entered the offices of the Brazilian Naval Commission with the intent to steal, and that he did take property of a value in excess of $100.00, consisting of one electric typewriter. At trial on June 11, and 12, 1968, before District Court Judge Gerhard A. Gessell, sitting with a jury, appellant was found guilty as charged. On July 26, 1968, appellant was sentenced to a term of from two to six years on each count, the sentences to run

concurrently with one another. Appellant's motion to proceed on appeal *in forma pauperis* was granted on July 30, 1968.

Motion to Suppress Hearing [1]

Prior to trial on June 11, 1968, a hearing on appellant's motion to suppress evidence was held before Judge Gessell. The defense first called Pvt. Paul G. Resignato, of the Metropolitan Police, who testified to having received a "radio-run" on November 9, 1967, to proceed to the Metro-Media Building, located at 5151 Wisconsin Avenue, N.W., to investigate "trouble" at the scene. Resignato recalled that as he pulled up to the building, another squad car pulled up behind him and that he and the other officer proceed into the building. On their way in, Resignato noticed a man standing outside the building. He described the man as being negro, about six feet one or two inches tall and wearing a white fedora hat with a black band that was very noticeable. The officer identified the appellant as the man he had seen. (M. Tr. 5-6). Inside the building, Pvt. Resignato met the man who had called the police, a Mr. Miles.[2] This man related to the officer that the building was closed except for the clean-up crew. Miles told the officer that while cleaning one of the offices he observed someone in one of the offices. Upon inquiring of the person as to his presence there, the man (later identified as the appellant) told Mr. Miles that he was looking for a job and had responded to that office to see a certain party. When Mr. Miles told appellant that there was no such man, appellant departed the office. After Miles gave the officers a description of appellant, Pvt. Resignato told the other officer there that he would head south on Wisconsin Avenue in an effort to locate the man they had previously seen outside. (M. Tr. 7). From his scout car, Pvt.

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[1] The motion to suppress transcript will be referred to as (M. Tr.), and the trial transcript as (Tr.).

[2] The man to whom Pvt. Resignato spoke was later revealed to be Mr. Conrad Miles.

Resignato observed the appellant carrying a suitcase,[3] get into a taxicab in the 5000 block of Wisconsin Avenue. Falling in behind the cab, Resignato said that he stopped the taxi in the 4500 block of Wisconsin Avenue. The officer then told the driver of the cab to get out on the pretext that he had violated a traffic regulation. Resignato, at this point, approached the cab asking the appellant to get out. He asked appellant whether he had been at the Metro-Media Building. Appellant replied that he had, and that he had been seeking a job, giving the officer the name of a person whom he was supposed to have met there. Pvt. Resignato stated that the appellant was not frisked, and that the appellant was free to go if he wanted. The officer asked the appellant if he would return with him to the building and the appellant readily agreed. Pvt. Resignato indicated that had appellant refused he would have let appellant go. When asked whether he thought he had a felony, the officer replied, "No, sir, I didn't know what I had." (Tr. 7-10). At the place where the cab had been halted, according to Pvt. Resignato, were two other officers who had responded to a call for assistance. The appellant then returned voluntarily with the officers to the scene of the offense, taking with him the suitcase that he had had in the cab.

When they returned to the building, the appellant was asked what he had in the suitcase, and whether he'd mind if they saw what was in the suitcase. Resignato indicated that the appellant agreed and opened the suitcase revealing a typewriter with a sheet of paper in the carriage on which was type something in a foreign language. The officer stated that it was subsequently learned that a typewriter was missing from the office of the Brazilian Naval Commission. This information came from a maid who normally cleaned this office. Appellant was then placed

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[3] Resignato stated that Miles had never told him that the appellant was carrying a suitcase at the time (M. Tr. 8). As will be revealed *infra*, Mr. Miles testified that he told the officers that the man had a suitcase with him (M. Tr. 42), and this is corroberated by Officer Budzenski, who recalled that Miles communicated that fact to him in the presence of Resignato (M. Tr. 27).

under arrest by Resignato's partner, Pvt. Budzenski. Appellant, at this time claimed the typewriter was his. Budzenski, according to Pvt. Resignato, read to appellant his rights, and then indicated to the appellant that he would call one of the Brazilian officials to verify the ownership of the typewriter. Appellant thereupon admitted having stolen the typewriter. This statement was not in response to a question (M. Tr. 12-13, 20-21). On cross, Pvt. Resignato indicated that he arrived at the office building some two or three minutes after receiving the radio-run, and that about ten minutes elapsed between the time he spoke with Mr. Miles and he saw the appellant entering a cab on Wisconsin Avenue (M. Tr. 15, 17).

Pvt. William A. Budzenski was next called by the defense, who testified similarly to Pvt. Resignato regarding the receipt of a radio-run at approximately 5:58 p.m. to investigate trouble at 5151 Wisconsin Avenue, N.W. The officer also recalled seeing a man standing outside the building wearing a white hat with a black band around it, as he entered the building. He remembered speaking with Mr. Miles, and related that Miles had told him about seeing a man fitting the description of the appellant in an office on the fifth floor of the building, who, Miles indicated, had no right being there (M. Tr. 24-26). Pvt. Budzenski said that the door to the building was open. He recalled that the description of the man given by Miles comported with that of the man he had seen previously outside. Budzenski also remembered Miles telling him in the presence of Resignato that the man (later identified as the appellant) was carrying a suitcase. Before going outside, Budzenski stated that they searched the building for approximately five to ten minutes, after which Resignato and he went to their squad cars, Resignato going south on Wisconsin, and he going north. While cruising, he received a report to return to the scene. At the scene, Budzenski saw the two other police officers with Resignato, and the appellant.[4] Appellant was then asked if the offi-

[4] As far as Budzenski was concerned appellant was not at this time in custody and was free to go (M. Tr. 29).

cers could see what was in the suitcase. Appellant having no objection, the case was opened revealing the typewriter. The officer then testified that they went upstairs with the appellant to the fifth floor office, and noted a desk without a typewriter where it seemed as though one should have been. The same type of carbon paper that was found in the typewriter when discovered was also seen on the desk. Appellant was placed under arrest, advised of his rights, and then asked about the typewriter. Appellant, Budzenski noted, disclaimed knowledge of the typewriter. As the officer began to call the official in charge of the office, appellant was said to have "thrown up his hands" and admitted taking the typewriter (M. Tr. 32).

Mr. Conrad Miles succeeded Budzenski as a witness, testifying that on the November 9, 1967 he was a night supervisor of the clean-up crew at the Metro-Media Building. He had reported to work between 5:00 and 5:30 p.m. The witness admitted that the front door of the building leading to the lobby was still open, that people could freely come and go after 6:00 p.m., but that most of the people had left the building (M. Tr. 33-35). Miles also stated that there was nothing to prevent someone from taking the elevator to any of the floors. The witness recalled observing a man he later identified as the appellant, carrying a suitcase about four feet long, enter the elevator, and, by watching the floor indicator, noted that he went to the fifth floor. Mr. Miles then followed, taking the elevator to that floor. Arriving there he noticed the appellant in the "Brazilian room", which office he had recently unlocked for the purpose of cleaning. Miles stated that no one was working in the office at this time. The witness then asked appellant if he could help, the appellant replying that he was looking for a Mr. Bent. Mr. Miles indicated that he didn't like what he saw and in order to stall the appellant suggested that they go to the basement to see if Mr. Bent was there. Miles testified that after descending in the elevator, appellant, instead of getting off, stayed on and apparently returned to the fifth floor (M. Tr. 36-40). Thereafter, Miles called the police, the time being some-

where between 5:30 and 5:45 p.m. When the officers arrived Miles told them about seeing a man in the Brazilian office, that he thought the man might have taken something and that the man was carrying a large suitcase.[5] Miles agreed that the officers told him that a man that they had seen outside the building fit the description he had given to the police. The witness was unsure whether appellant, when he was brought back to the scene was in custody, or whether a formal declaration of arrest was made, but did recall one of the officers relating to appellant some of his rights (M. Tr. 40-45).

Mrs. Pearl Mitchell, was next called and testified to having been summoned to an office to see whether anything was missing. The witness told the police that a typewriter that she had seen the previous evening was missing. (Mr. Tr. 48-50).

Last called by the defense was the appellant who recounted the events surrounding his arrest on the night of November 9, 1967. He remembered the cab in which he was riding on Wisconsin Avenue being stopped by the police officer, and recalled the police officer talking to the cab driver for about 50 seconds. Thereafter, he said, the policeman came over to the cab and asked him to step outside. He was then asked to place his hands on the cab, frisked, and later told to accompany the police officers back to the office building. Appellant stated that he did not feel free to leave and that because of his prior "slight" dealings with the police, he felt compelled to obey the officers (M. Tr. 52-54). Upon returning to the building, he was escorted in by two police officers holding his arms. There he was identified by Mr. Miles, and was then asked by the police whether he minded if they looked in his suitcase. On his negative reply, appellant stated they opened the bag uncovering the typewriter. Appellant told the police that he had not taken it, and thereupon was taken to the

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[5] Miles stated that before the policeman left the building, they went up to the Brazilian Naval Commission offices and noticed a desk from which a typewriter appeared to be missing (M. Tr. 43).

fifth floor. There, Mrs. Mitchell, appellant said, told to the police that a typewriter appeared to be missing from the office (M. Tr. 58).

Upon completion of the appellant's testimony, his counsel argued, in substance, that the arrest of appellant had taken place when the cab was stopped, and at the time Pvt. Resignato lacked probable cause to arrest (M. Tr. 71-76). Thereafter the trial court ruled in accord with the defense contention that the arrest had taken place at the stopping of the cab. The trial court disagreed with the defense on the issue of probable cause to arrest, stating:

> The officer was apprised that the man arrested fitted the description of a strange man observed in the offices of the Brazilian Naval Commission about 5:45 p.m., carrying a suitcase, after closing hours, whose conduct had been sufficiently suspicious to lead the custodian to call the police.
>
> Housebreaking is a felony. It is committed when there is entry without breaking with specific intent to steal. There was entry, and the surrounding circumstances were sufficient from which a reasonable cautious man could infer intent. Accordingly, the typewriter found in the Defendant's suitcase will not be suppressed (M. Tr. 77).

The trial court did, however, suppress any statements made by the appellant subsequent to the time of arrest (M. Tr. 77).

The Trial

The Government called Officers Budzenski and Resignato, and Mr. Miles in its case-in-chief, whose testimony regarding the facts of the alleged offenses was substantially similar to that they had given in the hearing on the motion to suppress (Tr. 38-78). In addition the Government called Commander Bernard David Blower of the Brazilian Navy, and second-in-command of the Brazilian Naval Commission. The Commander identified a purchase order for the typewriter in question, and recalled its purchase. He recalled, in addition, that when he left the of-

fice at about 5:00 p.m., on November 9, 1967, the typewriter was still in the office. He also indicated the price of the machine, purchased two months previously, to be $535.00 (Tr. 23-31).

The only witness called by the defense was the appellant who told an elaborate story about meeting someone named "Chuck" at a theatre near the Metro-Media Building. The story went on that Chuck had asked him whether he wanted to buy a typewriter. Appellant agreed. Thereafter he saw Chuck enter the Metro-Media Building. After becoming impatient he entered the building saw a suitcase there that appeared to be empty grabbed it and went to the fifth floor, where he met Mr. Miles. He told Miles he was looking for a man named "Benton". He later left the building and waited outside for about five minutes. Appellant recalled being seen by the police. Thereafter he decided to go home, and while waiting for a bus across the street, "Chuck" came along carrying a suitcase, and after viewing the typewriter contained therein, appellant paid "Chuck" some $27.00 for it. He then took a cab, and recounted his subsequent arrest after the cab was stopped. (Tr. 84-97).

After closing arguments, and the trial court's instructions, the jury retired to deliberate at 2:55 p.m. A verdict of guilty as charged was returned at 3:50 p.m.

ARGUMENT

I. The trial court was correct in determining that the officer had probable cause to arrest despite the officer's reservations to the contrary.

Counsel for appellant takes issue with the trial court's determination that Pvt. Resignato had probable cause to arrest appellant, averring that this determination was precluded by the officer's statement that he did not think that he had a felony, and that, "[He] did not know what he had" (M. Tr. 10).[6] Appellant's conclusion, the Gov-

[6] Appellant does not appear to question the trial court's ruling as to the time of the arrest. We note that it seems clearly within the perview of the trial court to make such a determination despite

ernment submits, is fallacious. As was noted by the Supreme Court in *Husty* v. *United States*, 282 U.S. 694, 700-701 (1931);

> To show probable cause it is not necessary that the arresting officer should have before him legal evidence of the suspected legal act. *Dumbra* v. *United States*, 268 U.S. 435, 441; *Carroll* v. *United States*, [267 U.S. 132]. It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead *a reasonably discreet and prudent man* to believe that liquor illegally possessed in the automobile to be searched.[7] (Emphasis added).

The Government submits that the standard to be applied is not what in fact the arresting officer believed, but rather what a reasonable cautious, and prudent police officer could have believed, possessed with the knowledge

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the testimony of the police officers as to when they thought the arrest took place. See *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 389 F.2d 305 (1968); *Seals* v. *United States*, 117 U.S. App. D.C. 79, 325 F.2d 1006 (1963), *cert. denied*, 376 U.S. 964 (1964); *Coleman* v. *United States*, 111 U.S. App. D.C. 210, 295 F.2d 555 (*en banc* 1961), *cert. denied*, 369 U.S. 813 (1962); *Harris* v. *United States*, 389 F.2d 727 (5th Cir. 1968).

The fact that an arrest may not have taken place at the stopping of the cab, as the police testified, would not however invalidate a search made prior to arrest if at the time of the arrest the police had probable cause. *Bailey* v. *United States*, *supra*, at 557, 389 F.2d at 308; *Harris* v. *United States*, *supra*, 389 F.2d at 730. See also *Gorman* v. *United States*, 355 F.2d 151, 159-160 (2d Cir. 1965); *cert. denied*, 384 U.S. 1024 (1966); *People* v. *Simon*, 45 Cal.2d 645, 290 P.2d 531, 533 (1955). The rationale in these cases would seem to run counter to appellant's position that this court is precluded *a priori* from determining whether probable cause existed, "if an arresting officer does not believe from the information he has, that he has reason to make an arrest without a warrant." (Appellant's Brief p. 19).

[7] "[T]he officer in his particular circumstances, conditioned by his observations and informations, and guided by the whole of his police experience, reasonably *could have believed* that a crime had been committed by the person to be arrested." *Jackson* v. *United States*, 112 U.S. App. D.C. 260, 262, 302 F.2d 194, 196 (1962). (Emphasis added). See also, *Pendergrast* v. *United States*, D.C. Cir. No. 21,031, decided March 31, 1969 (slip op. at 10-11).

available to him at the time of the arrest. As was said by the Seventh Circuit in *United States* v. *Sorce*, 325 F.2d 84, 86 (7th Cir. 1963), *cert. denied*, 376 U.S. 931 (1964) in upholding the validity of an arrest:

> We think *prudent men in the shoes of the agents* would have seen enough to permit them to believe that the defendants were violating the law. This is the test of legality of the arrest, which in turn is determinative of the legality of a search incident to an arrest. (Emphasis added).

The Government's position regarding the test to be applied finds further and more specific support from the District Court of Connecticut, writing in *United States* v. *Russian*, 192 F. Supp. 183, 184-185 (D. Conn. 1961):

> The subjective state of the arresting officer's minds, however, is not the touchstone of the legality of the arrest because the proper standard is an objective one. Whenever the officers are in possession of an arrest, warrant, they doubtless have in mind that they are making the arrest pursuant to the warrant; but the cases demonstrate that even though a warrant may be held invalid by the court many months after arrest, the Government may justify it by showing that at the time a lawful arrest could have been made without a warrant. In *DiBella* v. *United States*, [284 F.2d 897 (2d Cir), *rev'd on other grounds*, 369 U.S. 121 (1962)] the warrant was found to be invalid, but the arrest was upheld. "Although Costa [the agent] apparently believed that the warrant was a valid one, yet even though it was not, the arrest may be justified on the ground that Costa had reasonable grounds to believe that DiBella had committed a narcotics violation." 284 F.2d at page 963. See also, *Giordenello* v. *United States*, *supra*, 357 U.S. at page 488, 78 S. Ct. at page 1251. (Emphasis added).

See also, *Hagans* v. *United States*, 315 F.2d 67 (5th Cir.) *cert. denied*, 375 U.S. 826 (1963); *United States* v. *Rundle*, 280 F. Supp. 453 (E.D. Pa.) *aff'd*, 404 F.2d 42

(3rd Cir. 1968); *United States* v. *O'Donnell*, 209 F. Supp. (S.D. Maine 1962).

The Seventh Circuit appears to have met this issue squarely when it said in *Thornton* v. *Buchmann*, 392 F.2d 870, 874 (7th Cir. 1968), "Neither the fact that the district attorney declined to issue a warrant, not the fact that the police presently think they have no case establishes that the police did not have probable cause to arrest."

The case of *Foreman* v. *Warden, Maryland Penitentiary*, 241 F. Supp. 161 (D. Md. 1965), factually similar in some respects to the instant case, buttresses the view espoused by appellee, that the objective standard of what the reasonable prudent and cautious police officer could have believed controls in determining whether probable cause existed. In that case the defendant was seen in a tavern and asked to step outside whereupon he was told that he was "suspected" of burglary and asked if he would accompany the police officers to the station house. The officers testified that the defendant agreed to go voluntarily. On the way there they stopped at the complainant's house where he was identified by her, after which he was formally arrested. The District Court determined that, despite the officers' testimony, to the contrary the arrest took place on the street, and that, using the objective test, the arrest was valid since the police had at that time sufficient information showing probable cause.

This Court faced a similar situation in *Bell* v. *United States*, 102 U.S. App. D.C. 382, 254 F.2d 82, *cert. denied*, 358 U.S. 885 (1958) where, at least according to Chief Judge Bazelon's dissent, the appellants were arrested "on suspicion of housebreaking", and further "The officer, as the statement of the charge indicates, had only suspicion because no housebreaking had occurred in his presence, and *he was not even aware that one had occurred* outside his presence." Id., at 389, 254 F.2d at 88. The majority was not troubled by this, however, stating, *id.*, at 387, 254 F.2d at 86:

> At the trial in the case at bar, in answer to the question "And for what offense were they being arrested

> at the time?", the officer testified, "Investigation of a housebreaking." Of course there is no such crime as "Investigation". But this description given by the officer does not go to the question of probable cause. The question is not what name the officer attached to his action; it is whether, in the situation in which he found himself, he had a reasonable ground to believe a felony had been committed and the men in the car had committed it.

See also *Payne* v. *United States*, 111 U.S. App. D.C. 94, 294 F.2d 723, *cert. denied*, 368 U.S. 883 (1961). The aforementioned cases, the Government avers, make untenable appellant's position that "it is only where the arresting officer asserts his belief that a felony had been committed, that inquiry into the reasonableness of this belief becomes relevant." (Appellant's brief p. 19).

II. The information possessed by the arresting officer amply supported the trial court's finding that a reasonable, prudent and cautious police officer would have had probable cause to believe a felony had been committed by the appellant.

Appellant also argues that the facts known to the Pvt. Resignato at the time of appellant's arrest were not sufficient to show probable cause that a felony had been committed by the appellant. We disagree. As was noted by the Supreme Court in *Henry* v. *United States*, 361 U.S. 98, 102 (1959), in order to show probable cause, "[e]vidence required to show guilt is not necessary." Further, in *Brinegar* v. *United States*, 338 U.S. 160, 173 (1951), that Court noted, "[t]here is a large difference between the two things to be proved [guilt and probable cause], as well as the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them." And further id. at 175:

> In dealing with probable cause, however, as the name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act."

Pvt. Resignato indicated that he spoke with Mr. Miles, the supervisor of the night clean-up crew of the Metro-Media Building, who stated to Resignato that he saw a man fitting the description of the appellant in the offices of the Brazilian Naval Commission. Upon inquiry as to the man's purposes, the man stated that he was looking for a certain party, that Mr. Miles told the appellant there was no such man. (M. Tr. 6). Mr. Miles stated that he saw appellant in the office in question, which had been unlocked by him previously, in order to clean it, and that there was no one in the office at the time he unlocked it (M. Tr. 37-38). Miles also indicated that the time that this occurred was somewhere between 5:30 and 5:45 p.m. (Mr. Tr. 42). Miles stated that while the front door was open to the building, most of the persons in the building had gone home (M. Tr. 34). The supervisor also indicated that he told the officers that the man was carrying a suitcase about four feet long,[8] and that "he didn't like what he saw" in the office, and that he suspected that the man had taken something (M. Tr. 36, 39, 42-43). This witness also related that before the police went after appellant they "all went upstairs and checked the table that was empty, that we thought a typewriter had belonged" (M. Tr. 43). He also recalled that after he give the police

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[8] As we have previously noted, Pvt. Resignato stated that he was never told that the man was carrying a suitcase, but that Pvt. Budzenski did recall receiving such information. See footnote 3, *supra*. A reading of the transcript will reveal some other minor inconsistancies in the witnesses testimony. In a somewhat analagous situation this Court recently had occasion to say in *Gaither and Tatum* v. *United States*, D.C. Cir. Nos. 21,780, 22,148 and 21,864, decided April 8, 1969, *modified on other grounds*, April 28, 1969 (slip op. at 24):

> Whether the judge believed Peace's version of what he saw, or believed Krauss' slightly different version of what was visible to the two officers, he was justified in concluding that Peace had probable cause to arrest Gaither. Rule 41, Fed. R. Crim. P., does not require that the judge on a motion to suppress make formal findings of fact, and especially here, where either of the two slightly conflicting versions of the arrest gave probable cause, it was well within the court's discretion to refuse to make such findings.

a description of the man, they indicated that they had seen him outside (M. Tr. 43). This information available to the arresting officer was patently sufficient for a reasonable police officer to believe that appellant had entered the Brazilian Naval Offices with the intent to steal,[9] and the testimony of the witnesses amply supported the trial court's finding that probable cause existed.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
DANIEL E. TOOMEY,
Assistant United States Attorneys.

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[9] As this Court pointed out in *Dixon* v. *United States*, 111 U.S. App. D.C. 305, 306-307, 296 F.2d 427, 428-429 (1961):

> The decisive factors are that *all the circumstances are to be considered together*, in a sum total; that the circumstances to be considered are those of the moment; that the impression to be evaluated is the impression upon the mind of a reasonable prudent police officer; and that the impression made upon him by the circumstances is a reasonable belief that a crime has been, or is about to be committed. (Emphasis added).

In *Jackson* v. *United States*, *supra*, note 7, at 262, 302 F.2d at 196, this Court said, "[w]e have also emphasized from time to time that probable cause is not to be evaluated from the remote vantage point of the library, but rather from the viewpoint of a prudent and cautious police officer on the scene at the time of the arrest."

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No. 22,322

APPELLANT'S PETITION FOR REHEARING WITH SUGGESTION THAT IT BE EN BANC

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Appellee

v.

JOHN L. EDWARDS, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Alexander Boskoff
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Attorney for Appellant
(By Appointment of this Court)

I N D E X

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APPELLANT'S PETITION FOR REHEARING WITH SUGGESTION THAT IT BE EN BANC

Appellant respectfully petitions for a rehearing of his appeal, which has been denied without opinion by judgment of this Court bearing date 27 October 1969. In addition, appellant pursuant to Rule 35, F.R.A.P., and Rule 14 of this Court, respectfully suggests that the appeal involves a question of exceptional importance, and should be considered by the Court en banc in consonance with legal doctrine consistently enunciated in its decisions.

QUESTION PRESENTED

The arresting officer testified unequivocally that, at the time of arrest, he held no belief that the appellant had committed a crime. The trial court, nevertheless, ruled that, despite this absence of belief, there existed at the time of the arrest facts which in its view constituted probable cause for arrest without a warrant. It, accordingly, held the arrest valid and ruled admissible incriminating evidence found during the police search following the arrest.

The ruling of the trial court, and its affirmance by this Court, raises questions of critical importance to the safeguarding of constitutional rights against the arbitrary exercise of policy authority. If the police officer need not even hold a threshhold belief that a crime has been committed, is this Court not consenting to investigatory arrests? What restrictions remain upon arrests without a warrant, if a police officer need not make the initial decision as to the commission of a crime? Is the Court not corrupting the judicial function, when it finds probable cause to exist although the arresting officer did not so view the circumstances known to him at the time?

The arresting officer in this case unequivocally testified that at the time of arrest he did not have grounds which in his opinion would justify arrest without a warrant. It was the arresting officer's contention that the arrest had not taken place at the time he had stopped the taxicab in which appellant was riding, under pretext that the cab driver had violated a traffic regulation. It was the arresting officer's contention that he had made the arrest only after appellant had voluntarily accompanied him back to the office building in question, appellant's suitcase had been opened, revealing a typewriter, and investigation thereafter indicated that a typewriter appeared to be missing from a desk in the office in which appellant had initially been seen.

The trial court, however, overruled his contention, holding that the arrest had been made when the cab had been stopped, and appellant removed, frisked and placed in a squad car for return (involuntarily) to the office building (Tr. 74, 76).

The testimony of the arresting officer leaves no doubt, that, at this point in time, he saw no basis for making an arrest (Tr. 9):

> Q Did you frisk him at that time?

A No, sir.

Q Was he free to go?

A I asked him if he would go. If he had refused, I would have let him go.

Q You have let him go?

A Yes, sir.

This Court has in many cases, in which probable cause has been doubtful, resolved the issue against the one arrested with the justification that probable cause must be determined from the perspective of the arresting officer as the situation developed before him. Over the years this Court has gradually arrived at a rationale which indirectly effects a presumption that the arrest is valid. This rationale was most fully developed in Jackson v. United States, 1962, 112 U.S. App. D.C. 260, 302 F.2d 194, 196-197, in which the opinion of the Court describes the police officer's decision in terms of a "balance sheet process", in which every bit and scrap of information known to him regardless of source, may be used to support an arrest. This standard for judicial review is so broad (and formless) that Judge Washington felt called upon to file a concurring opinion, in which he attempted to attach a caveat insisting that previously enunciated "standards should be strictly observed by the police, and the courts should view adversely any departure from them."

In the instant case, the approach overreaches that used in the Jackson case. In that case and in all the others, the arresting officer believed that he had grounds for an arrest. Even the Jackson case leaves no doubt that it assumes at the outset the existence of a belief by the arresting officer that he has grounds for the arrest. It concludes its discussion of the "balance sheet process" by observing, at page 197: "Finally, at some point the officer must make a decision, culled from a balance of these negatives and positives, and then act on his decision."

This case is not attended by the problem of semantics present in Bell v. United States, 1958, 102 U.S. App. D.C. 383, 254 F.2d 82. In this case, the arresting officer's testimony is free of ambiguity. In his words he "would have let [appellant] go", if appellant had refused to accompany him back to the office building, where the search took place. Unless we are to charge the police officer with a violation of duty, it is clear that appellant would have been released, because the officer saw no grounds for detaining him.

This testimony must be accepted as binding and conclusive as to the police officer's state of mind. The court cannot treat the testimony otherwise. It is true that the police officer's actions at the cab constituted an arrest, and the arrest did not comport with the officer's sworn testimony that appellant was free to go.

But the anomaly vanishes upon reflection. The police officer testified truthfully when he stated, in effect, that he had no grounds upon which to arrest appellant. He, nevertheless, decided to effect appellant's detention, while he made an investigation to see whether appellant's presence in the building was innocent or criminal. It was this decision to make an investigatory arrest, which the officer was attempting to cover up by contending that appellant had voluntarily accompanied him back to the office building and allowed his suitcase to be searched.

The doctrine of probable cause establishes a standard for judicial review of a police officer's belief that he had grounds for arrest. It is not applicable where, as here, the police officer testifies that he believed grounds for arrest did not exist. The trial court may not, as it did here, brush aside the police officer's belief, and substitute its own. In doing this it intruded itself into a police function.

Hundreds of cases throughout the Federal jurisdiction give evidence to the endless struggle of the courts to recreate the situation which faced the police officer at the moment of arrest. In none of them can we find an instance where the police officer does not assert his belief that he had sufficient grounds for arrest.

In Bell v. United States, supra, at page 87, this Court wrote:

> The sum total of the reams that have been written on the subject is that a peace officer may arrest without a warrant when he has reasonable grounds, in light of the circumstances of the moment as viewed through his eyes, for belief that a felony has been committed and that the person before him committed it. We require police officers to be reasonable; we too must be reasonable.

The decisive words here are, "as viewed through his [police officer's] eyes". Appellant contends that, even if the arresting officer had believed that he had sufficient grounds for an arrest, he would have been legally unjustified in holding such a belief. But there is no need to argue probable cause, because the police officer concedes that probable cause did not exist at the time he stopped the cab and removed appellant.

Joining together the police officer's lack of belief and the trial court's determination that the arrest was made at the cab produces the inescapable conclusion that the police officer had knowingly effected an investigatory arrest. The arrest was, therefore, illegal, and the results of the attending search inadmissible in evidence. Gatlin v. United States, 1963, 117 U.S. App. D.C. 123, 326, F.2d 666.

The court may not restructure the arresting officer's recital of what was, to something that in its view might have

been. To do so would violate the unbroken line of authority in the Supreme Court and in this court that probable cause is to be viewed through the eyes of the arresting officer at the time of arrest.

If the court may disagree with the police officer, and substitute its affirmative belief for his lack of belief, what restrictions remain on the arresting power? What remains of the "judging process" on the part of the arresting officer, as postulated in the Jackson case, supra?

Police officers who have doubt about the guilt of a citizen should be encouraged to defer arrest until further investigation resolves the doubt. The rationale in this case encourages the police officer to resolve the doubt against the citizen. It invites him to leave off doubting for action, reserving the decision as to probable cause entirely for the courts.

The judgment appealed from, if allowed to stand, must inevitably serve to corrupt the judicial function. It requires the courts to participate in what is clearly a police function. The courts cannot do this and preserve their impartiality in judging the opposing claims of police and the citizenry.

Grounds for arrest must exist prior to arrest and search; and the results of the search may not be used to

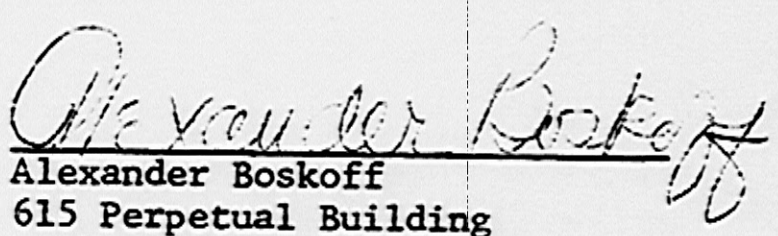
furnish probable cause. It is, however, fanciful to believe that the fact of guilt, as revealed by incriminating evidence produced by the search, can be completely erased from the mind of the reviewing court. If the police officer's lack of belief prior to the arrest can be ignored by the court, the process of assessing probable cause tends to become a sham. Where the arrest produces no incriminating evidence, the citizen is released, and the arrest never becomes a matter for judicial scrutiny. Each case which comes before a court, then, is one which guilt is more or less apparent. The issue, however, is the citizen's claim that his constitutional rights have been violated. Refusal to be bound by the arresting officer's view of lack of probable cause inevitably foreshadows a less favorable judicial view of the right to be secure against an unreasonable search. A police decision made prior to search necessarily must be less prejudicial to the citizen than a judicial determination made with the knowledge of actual guilt.

C O N C L U S I O N

Appellant's arrest was affected without probable cause. The ensuing search was, therefore, illegal, and the fruits of that search inadmissible in evidence. As the fruits

of the search were the only incriminating evidence introduced against appellant on trial, the judgment of conviction should be reversed and the trial court directed to enter a judgment of acquittal.

Respectfully submitted,



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